

1 THE HONORABLE THOMAS S. ZILLY
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 JEFF SHERRILL, on behalf of himself and
9 a class of those similarly situated,

10 Plaintiff,

11 v.

12 PREMERA BLUE CROSS; LIFEWISE
13 HEALTH PLAN OF OREGON; and
14 LIFEWISE ASSURANCE CO.,

Defendants.

NO. 2:10-cv-00590-TSZ

**AMENDED ORDER (1) CONFIRMING
CERTIFICATION OF CLASS AND
COLLECTIVE ACTION, (2) GRANTING
FINAL APPROVAL TO CLASS ACTION
SETTLEMENT, AND (3) DIRECTING
ENTRY OF JUDGMENT**

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16 On June 10, 2011, a hearing was held on the unopposed motion of Plaintiff Jeff Sherrill
17 for final approval of the class settlement; and on the separate motion of Plaintiff and his counsel
18 for awards of the Class Representative Service Payment and the Class Counsel Attorneys' Fees
19 and Costs Payment. Jahan C. Sagafi, Anne B. Shaver, and Michael C. Subit appeared for
20 Plaintiff; and Karl Quackenbush appeared for Defendants Premera Blue Cross, Lifewise Health
21 Plan of Oregon and Lifewise Assurance Co. (hereinafter, "Premera").

22 The Parties have submitted their Joint Stipulation of Class Settlement and Class
23 Settlement Agreement (the "Settlement"), which this Court preliminarily approved in its February
24 28, 2011, order (the "Preliminary Approval Order"). In accordance with the Preliminary
25 Approval Order, Class Members have been given notice of the terms of the Settlement and the
26 opportunity to comment on it or to opt out of its provisions. In addition, pursuant to the Class

1 Action Fairness Act of 2005, 28 U.S.C. § 1715 (“CAFA”), Premera gave the Attorney General of
 2 the United States and the appropriate state officials of Washington, Oregon, Idaho, and California
 3 notice of the Settlement on May 25, 2011.

4 Having received and considered the Settlement, the supporting papers filed by the Parties,
 5 and the evidence and argument received by the Court at the final approval hearing on June 10,
 6 2011, by means of this order (the “Final Approval Order”) the Court grants final approval to the
 7 Settlement, and HEREBY ORDERS and MAKES DETERMINATIONS as follows:

8 1. Except as otherwise specified herein, the Court for purposes of this Final
 9 Approval Order adopts all defined terms set forth in the Settlement.

10 2. This Court has jurisdiction over the subject matter of this litigation and all
 11 related matters and all state and federal claims raised in this action and released in the Settlement,
 12 and personal jurisdiction over Premera and all Class Members (except for those who timely filed
 13 opt out requests). Specifically, this Court has federal question jurisdiction over this action
 14 pursuant to 28 U.S.C. section 1331; section 16(b) of the Fair Labor Standards Act (“FLSA”), 29
 15 U.S.C. § 216(b); and the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §
 16 1132(e)(1).

17 3. This Court also has supplemental jurisdiction over all state-law claims
 18 asserted by Plaintiff because the state-law claims derive from a common nucleus of operative fact
 19 and form part of the same case or controversy as those claims over which the Court has primary
 20 jurisdiction. *See* 28 U.S.C. § 1337 (providing for supplemental jurisdiction over related state-law
 21 claims that “form part of the same case or controversy”); *United Mine Workers v. Gibbs*, 383 U.S.
 22 715, 726 (1996) (federal courts have supplemental jurisdiction over state law claims that arise
 23 from the same “common nucleus of operative fact” such that the parties “would ordinarily be
 24 expected to try them all in one judicial proceeding”).

25 4. This Court also has jurisdiction to approve the Settlement’s release of
 26 claims by Class Members over which the Court has jurisdiction, even if the Court would not

1 independently have jurisdiction over those released claims. *See Grimes v. Vitalink*
 2 *Communications*, 17 F.3d 1553, 1563 (3d Cir. 1994) (citing *Class Plaintiffs v. City of Seattle*, 955
 3 F.2d 1268, 1287-88 (9th Cir. 1992) (“[A] federal court may release not only claims alleged in the
 4 complaint, but also state claims arising from the same nucleus of operative facts over which the
 5 court would not have jurisdictional competence.”); *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*,
 6 442 F.3d 741, 748 (9th Cir. 2006) (quoting *Class Plaintiffs*, 955 F.2d at 1287-89).

7 5. Pursuant to the Preliminary Approval Order, individualized notice was sent
 8 to each Class Member by first-class mail. The notices informed Class Members of the terms of
 9 the Settlement, their right to a share of the settlement proceeds, their right to comment on the
 10 Settlement or opt out of the Settlement and pursue their own remedies, and their right to appear in
 11 person or by counsel at the final approval hearing and be heard regarding approval of the
 12 Settlement. Adequate periods of time were provided by each of these procedures.

13 6. The Court finds and determines that this notice procedure afforded
 14 adequate protections to Class Members and provides the basis for the Court to make an informed
 15 decision regarding approval of the Settlement based on the responses of Class Members. Notice
 16 was accomplished in the manner prescribed by the Settlement. The Court finds and determines
 17 that the notice provided in this case was the best notice practicable, which satisfied the
 18 requirements of law and due process.

19 7. On May 25, 2011, Premera served upon the Attorney General of the United
 20 States and the appropriate state officials of Washington, Oregon, Idaho, and California a notice of
 21 the Settlement consisting of: a copy of the complaint in this action; a notice of the scheduled
 22 judicial hearings in this class action; copies of the Settlement; the proposed Notice; and the names
 23 of Class Members and their estimated proportionate share of the entire Settlement. The Notice of
 24 Settlement also invited comment on the Settlement.

25 8. Due to the delay in distribution of the CAFA notices, the parties have
 26 agreed to modify the Settlement Agreement in the following two ways:

1 a. First, the parties have agreed that the release period set forth in
 2 Section XV of the Settlement Agreement ends on June 10, 2011 (instead of “the date the Final
 3 Approval Order is entered by the Court,” which is the original text in the Settlement Agreement
 4 filed with the Court). The Court approves this change to the release period.

5 b. Second, the parties have agreed that, within three (3) court days
 6 following entry of this Order, Premera shall arrange for payment to the Settlement Administrator
 7 of an additional amount of \$14,897.26 as compensation for the delayed final resolution of this
 8 matter. Therefore, the total Settlement Payment shall be \$1,464,897.26 (instead of \$1,450,000,
 9 which is the original amount in the Settlement Agreement, Section I.S., filed with the Court) plus
 10 any investment earnings that have been credited to that amount since Premera timely deposited
 11 the originally agreed-to Settlement Payment with the Settlement Administrator. The Court
 12 approves this change to the Settlement Payment.

13 9. The Court finds and determines that Premera’s notice of Settlement was
 14 adequate and compliant with the statutory requirements of CAFA. Accordingly, 28 U.S.C.
 15 section 1715(e) has no application to the Settlement.

16 10. For the reasons stated in the Preliminary Approval Order, this Court finds
 17 and determines that the proposed Settlement Class, as defined in the definitions section of the
 18 Settlement and in section II of its Preliminary Approval Order, meets all of the legal requirements
 19 for class certification under Federal Rule of Civil Procedure 23 (“Rule 23”) (a) and (b)(3), and it
 20 is hereby ordered that the Settlement Class is finally approved and certified as a Class for
 21 purposes of settlement of this action.

22 11. For the reasons stated in the Preliminary Approval Order, this Court finds
 23 and determines that the action meets all of the legal requirements for certification as a collective
 24 action under section 16(b) of the FLSA, 29 U.S.C. § 216(b), for the three-year period preceding
 25 the filing of Plaintiff’s complaint, and it is hereby ordered that the action is certified as a
 26 collective action for purposes of settlement of this action.

1 12. Pursuant to Rule 23(e), the Court further finds and determines that the
 2 terms of the Settlement are fair, reasonable and adequate to the Class and to each Class Member
 3 and that the Class Members who have not opted out will be bound by the Settlement, that the
 4 Settlement is ordered finally approved, and that all terms and provisions of the Settlement should
 5 be and hereby are ordered to be consummated. The Court specifically finds that the Settlement is
 6 rationally related to the strength of Plaintiff's claims given the risk, expense, complexity, and
 7 duration of further litigation. This Court also finds that the Settlement is the result of arms-length
 8 negotiations between experienced counsel representing the interests of the Class Members and
 9 Premera, under the supervision of an experienced and independent third-party mediator, after
 10 thorough factual and legal investigation. *Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003);
 11 *Class Plaintiffs*, 955 F.2d at 1291.

12 13. The Court further finds that the response of the Class Members to the
 13 Settlement supports settlement approval. Of the 133 Class Members, only two opted out of the
 14 Settlement. One Class Member filed a written objection to the Settlement as part of this notice
 15 process. The Court has reviewed and considered this objection. The objection argues that
 16 Premera's decision to classify the Class Members as exempt and the Class Members' long work
 17 hours are appropriate, concluding that the lawsuit is meritless. It also questions Plaintiff's
 18 motives in bringing the action. The objection underscores the difficulties Plaintiff would have
 19 faced in proving his claims on behalf of himself and the class. It therefore supports the
 20 reasonableness of the settlement, which provides real benefits to the Class Members in light of
 21 the difficulty of recovery in litigation.

22 14. The Court finds and determines that the payments to be made to the Class
 23 Members as provided for in the Settlement are fair and reasonable. The proposed plan of
 24 allocation is rationally related to the relative strengths of the respective claims asserted. The
 25 Court hereby gives final approval to and orders the payment of those amounts be made to the
 26 claimants out of the Settlement Payment in accordance with the terms of the Settlement.

1 15. The Court confirms as final the appointment of Plaintiff Jeff Sherrill as the
 2 Class Representative of the Washington Class under Rule 23 and as Class Representative of the
 3 nationwide FLSA Class under section 16(b). The Court finds and determines that the award of
 4 the Class Representative Payment of \$5,000 to Plaintiff for his services as the Class
 5 Representative, in addition to his individual Settlement Share, is fair and reasonable. The
 6 Plaintiff has satisfied the criteria as set forth in *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir.
 7 2003). Under *Staton*, such awards should be evaluated using ““relevant factors, includ[ing] the
 8 actions the Plaintiff has taken to protect the interests of the class, the degree to which the class has
 9 benefited from those actions, . . . the amount of time and effort the Plaintiff expended in pursuing
 10 the litigation . . . and reasonabl[e] fear[s] of workplace retaliation.”” *Staton*, 327 F.3d at 977
 11 (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)) (ellipses in original). Here,
 12 Plaintiff’s initiation of the lawsuit caused him personal exposure and potential adverse
 13 consequences with future employers. Plaintiff’s assertion of Washington state law claims on
 14 behalf of his fellow Class Members tolled the statutes of limitations for those state law claims, to
 15 the benefit of the Class Members who worked or work in Washington. Furthermore, Class
 16 Counsel attests that Plaintiff was substantially involved throughout the litigation, educating
 17 Plaintiff’s counsel on Class Members’ job duties and Premera’s policies and procedures. Plaintiff
 18 submitted a declaration regarding his Premera work experiences, which contributed to the
 19 settlement. Plaintiff also attended the Parties’ settlement negotiations. The Court hereby gives
 20 final approval to and orders that the Class Representative Payment of that amount be made to
 21 Plaintiff out of the Qualified Settlement Fund in accordance with the terms of the Settlement.

22 16. The Court confirms as final the appointment of the following law firms and
 23 attorneys as class counsel (“Class Counsel”) for the Rule 23 and FLSA Classes: Kelly M.
 24 Dermody, Jahan C. Sagafi, and Anne B. Shaver of Lieff, Cabraser, Heimann & Bernstein LLP,
 25 and Michael C. Subit of Frank Freed Subit & Thomas LLP. The Court finds and determines that
 26 the payment of \$362,500 in attorneys’ fees and \$13,206 in litigation costs and expenses, for a

1 total payment of \$375,706 to Class Counsel, is fair and reasonable. The Court hereby gives final
 2 approval to and orders that that payment of that amount be made to Class Counsel out of the
 3 Qualified Settlement Fund in accordance with the terms of the Settlement.

4 17. Nothing in this Final Approval Order will preclude any action to enforce
 5 the Parties' obligations under the Settlement or under this order, including the requirement that
 6 Premera make the Settlement Payment in accordance with the terms of the Settlement.

7 18. Upon completion of administration of the Settlement, the Settlement
 8 Administrator will provide written certification of such completion to the Court and counsel for
 9 the Parties.

10 19. By operation of the entry of this Final Approval Order and pursuant to the
 11 Settlement, all Participating Class Members are permanently barred from prosecuting against the
 12 Premera Parties any Participating Class Member Released Claim as set forth in section XV of the
 13 Settlement. The Court has reviewed the release in section XV of the Settlement and finds it to be
 14 fair, reasonable, and enforceable under Rule 23, the FLSA and all other applicable law.

15 20. If, for any reason, the Settlement ultimately does not become Final (as
 16 defined in the Settlement, section I(K)), this Final Approval Order will be vacated; the Parties
 17 will return to their respective positions in this action as those positions existed immediately
 18 before the parties executed the Settlement; and nothing stated in the Settlement or any other
 19 papers filed with this Court in connection with the Settlement will be deemed an admission of any
 20 kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties
 21 for any purpose in this action or in any other action.

22 21. The Parties entered into the Settlement solely for the purpose of
 23 compromising and settling disputed claims. Premera in no way admits any violation of law or
 24 any liability whatsoever to Plaintiff and the Class, individually or collectively, all such liability
 25 being expressly denied by Premera. Premera in no way admits that this action could have been
 26 properly maintained as a collection action or a class action if it had not been settled.

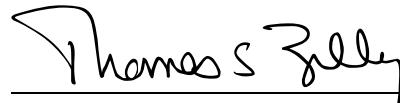
1 22. Pursuant to this Final Approval Order, the Court will enter a final judgment
2 in this action, as defined in Federal Rule of Civil Procedure 58(a)(1).

3 23. Without affecting the finality of the Court's judgment in any way, the
4 Court retains jurisdiction over this matter for purposes of resolving issues relating to
5 interpretation, administration, implementation, effectuation and enforcement of the Settlement.

6 24. The Parties are hereby ordered to comply with the terms of the Settlement.

7 25. Pursuant to the settlement of the parties, this action is hereby dismissed
8 with prejudice, each side to bear its own costs and attorneys' fees except as provided by the
9 Settlement and the Court's orders.

10 Dated: August 25, 2011.



11 Thomas S. Zilly
12 United States District Judge
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Presented By:

17 /s/ Jahan C. Sagafi

18 Jahan C. Sagafi

19 Admitted *pro hac vice*

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